

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 98

CHARLES L. BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF IN ERROR,

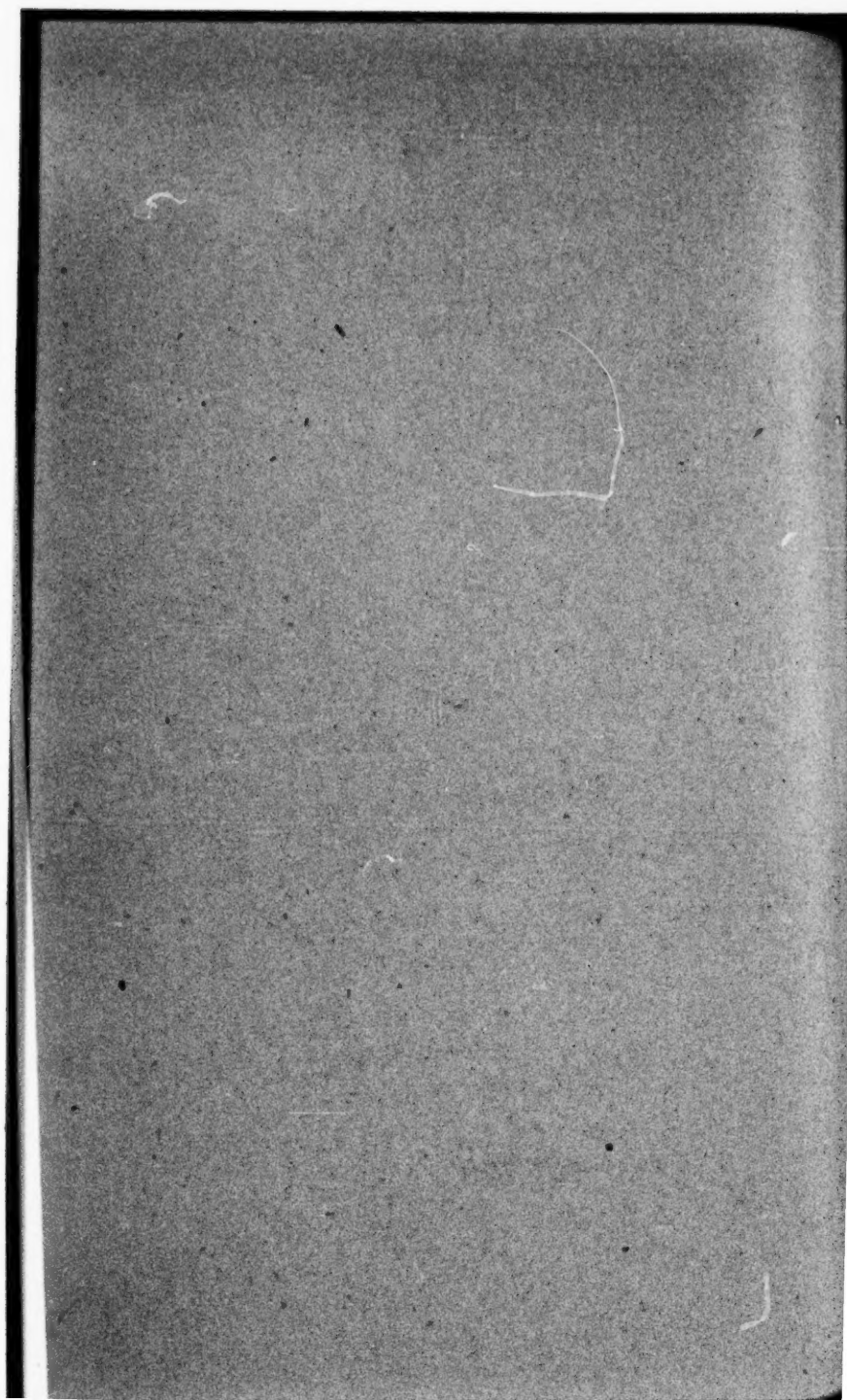
vs.

LOCOMOBILE COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MASSACHUSETTS.

FILED JULY 1, 1920.

(27,790)



(27,790)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 433.

CHARLES L. BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF IN ERROR,

vs.

LOCOMOBILE COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MASSACHUSETTS.

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1

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the Locomobile Company, a corporation duly organized under the laws of the State of West Virginia, and having an usual place of business in Boston, plaintiff, and Charles L. Burrill, of Boston, Mass., defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the second day of July next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and twenty.

JAMES S. ALLEN,
*Clerk of the District Court of the United
States, District of Massachusetts.*

Allowed by
G. W. ANDERSON,
U. S. Circuit Judge.

2

Return of District Court on Writ of Error.

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In Testimony Whereof, I James S. Allen, Clerk of said District

Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this twenty-sixth day of June, A. D. 1920.

[SEAL.]

JAMES S. ALLEN,
Clerk.

3 *Transcript of Record of District Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States, Begun and Holden at Boston, Within and for the District of Massachusetts, on the Third Tuesday of March, Being the Sixteenth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Before the Honorable James M. Morton, Jr., District Judge.

No. 1155. Law Docket.

LOCOMOBILE COMPANY, Plaintiff,

v.

CHARLES L. BURRILL, Defendant.

MASSACHUSETTS,
District, ss:

Writ.

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of Charles L. Burrill, of Boston, in our District of Massachusetts, to the value of seventy five hundred dollars, and summon said defendant (if he may be found in your District) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the first Tuesday of December. Then and there, in our said Court, to answer unto Locomobile Company, a corporation duly organized under the laws of the State of West Virginia, and having an usual place of business in Boston. In an action of Contract; to the damage of the said Locomobile Company (as it says) the sum of seventy five hundred dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doing therein.

4 Witness, The Honorable James M. Morton, Jr., at Boston, th 31st day of November, in the year of our Lord one thousand nine hundred and nineteen.

ARTHUR M. BROWN,
Deputy Clerk.

Acceptance of Service of Writ.

Boston, November 17, 1919.

Service of the within writ is hereby accepted in behalf of the defendant.

WM. HAROLD HITCHCOCK,
Attorney for Defendant.

This cause was duly entered at the December Term of this Court, A. D. 1919, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, December 2, 1919, the following Declaration was filed:

Declaration.

(Filed December 2, 1919.)

Now comes the plaintiff in the above entitled action and says that the defendant owes it the sum of \$4,685 & 64/100 dollars according to the account hereto annexed and marked "A."

By Its Attorneys, CHARLES A. SNOW,
WM. C. EVERTS.

*Account Annexed.**"A."*

Item 1. To money had and received by the defendant to the plaintiff's use, being the foreign corporation excise paid by the plaintiff to and unlawfully collected by the defendant on July 21, 1914 under the professed authority of Massachusetts Acts 1909, c. 490, Part 3, Section 56, while the Acts of 1914, c. 724, was still in force, the said excise being unconstitutional and void and having been unlawfully exacted and collected by the defendant from the plaintiff through duress, threats and compulsion.	\$1,300
Item 2. To interest on same to the date of the writ from the date of demand for the repayment thereof contained in the plaintiff's petition filed in the Supreme Judicial Court for Suffolk County.	379.39
Item 3. To money had and received by the defendant to the plaintiff's use, being the foreign corporation excise paid by the plaintiff to and unlawfully collected by the defendant on April 24, 1916 under the professed authority of Massachusetts Acts 1909, c. 490, part 3, Section 56, while the Acts of 1914, c. 724 was still in force, the said excise being unconstitutional and void and having been unlawfully exacted and collected by the defendant from the plaintiff through duress, threats and compulsion.	1,300

Item 4.	To interest on same to the date of the writ from the date of plaintiff's petition filed in the Supreme Judicial Court for Suffolk County.....	212.25
6	Item 5. To money had and received by the defendant to the plaintiff's use, being the foreign corporation excise paid by the plaintiff to and unlawfully collected by the defendant on April 25, 1917 under the professed authority of Massachusetts Acts 1909, c. 490, Part 3, Section 56, while the Acts of 1914, c. 724 was still in force, the said excise being unconstitutional and void and having been unlawfully exacted and collected by the defendant from the plaintiff through duress, threats and compulsion.....	\$1,300
Item 6.	To interest on same to the date of the writ from the date of plaintiff's petition filed in the Supreme Judicial Court for Suffolk County.....	164.02
Item 7.	Total.....	\$1,685.64

At the same term, to wit, December 5, 1919, the following Answer was filed:

Answer.

(Filed December 5, 1919.)

Now comes the defendant in the above entitled cause and makes answer to the plaintiff's writ and declaration as follows:

1. He denies each and every allegation in the plaintiff's writ and declaration contained.

2. And further answering, he says that this action was not brought within three months from the date of the payment of the taxes therein described, as required by St. 1909, c. 490, pt. II, §88.

3. And further answering, he says that at all times mentioned in the plaintiff's declaration he was the duly elected Treasurer and Receiver-General of the Commonwealth of Massachusetts; that each of the sums set forth in the declaration was assessed by the Tax Commissioner of the Commonwealth upon the plaintiff as taxes due under the statutes of the Commonwealth; that each of said sums was voluntarily paid by the plaintiff to him solely in his capacity of
 7 Treasurer and Receiver-General of the Commonwealth, and not otherwise, without protest and without any demand, threat, compulsion or duress by him or by any other person, and without the issuance of any legal process for the enforcement of said payments; that each of said amounts was paid by him into the treasury of the Commonwealth of Massachusetts as a part of the general revenue of the Commonwealth, and has now been expended by it for general public purposes; that no one of said taxes is in any respect unconstitutional or void; that said sums never came into the hands of the defendant personally but were thus received and paid

into the treasury of the Commonwealth in his behalf by the receiving teller in the employ of the Commonwealth, whose duty it was to receive such payments in behalf of the Commonwealth; that the defendant, except as a public officer of and in behalf of the Commonwealth, as aforesaid, had at no time received any sum of money from the plaintiff as alleged in the declaration, or otherwise, and owes the plaintiff nothing.

By His Attorney, WM. HAROLD BITCHCOCK,
Assistant Attorney-General.

Also at the same term, to wit, March 3, 1920, the following Agreed Statement of Facts was filed as of February 25, 1920:

Agreed Statement of Facts.

(Filed March 3, 1920, as of February 25, 1920.)

It is hereby agreed that the following facts may be taken as admitted facts, for the purpose of this case, subject to the right of either party to present further evidence and to request rulings of law.

The plaintiff is a foreign corporation transacting in Massachusetts both interstate and local business in conjunction.

The defendant was from January 20, 1915 to January 21, 1920, at the times herein referred to, the Treasurer and Receiver-General of the Commonwealth of Massachusetts, and, in connection with the collection of the excises claimed to be recovered herein, professed to act as such, under the authority of Massachusetts statutes (St. 1909, c. 490, pt. III, §56, and St. 1914, c. 724) and under the other sections of the same acts relating to such excises and the penalties for non-payment thereof and for failure to file the annual certificate of condition.

On April 24, 1916, more than thirty days after its annual meeting, the plaintiff submitted to the Tax Commissioner, without request or demand by him other than such request or demand as may be implied by law, its certificate of condition under the alleged requirements of St. 1909, c. 490, pt. III, § 54, which was approved by him and filed on the same day. On that day the Tax Commissioner issued a certificate purporting to show that there was due from the plaintiff an excise tax of thirteen hundred dollars (\$1,300), assessed pursuant to the statute of 1909, while the Acts of 1914, c. 724, were still in force.

On April 25, 1917, more than thirty days after its annual meeting, the plaintiff submitted to the Tax Commissioner, without request or demand by him other than such request or demand as may be implied by law, its certificate of condition, under the alleged requirements of St. 1909, c. 490, pt. III, §54, which was approved by him and filed on the same day. On that day the Tax Commissioner issued a certificate purporting to show that there was due from the plaintiff an excise tax of thirteen hundred dollars (\$1,300), assessed pursuant to the statute of 1909, while the Acts of 1914, c. 724, were still in force.

Each of these statutes professed to require that said excises should be paid to the Treasurer and Receiver-General of the Commonwealth at the time of filing the certificate of condition and before said certificate could be allowed to be filed.

9 These taxes were paid at the office of the defendant, as Treasurer and Receiver-General, on April 24, 1916 and April 25, 1917, by checks of the plaintiff, payable to the order of the Treasurer of the Commonwealth of Massachusetts. These checks were enclosed in letters which were received in due course of mail at the Treasurer's office either by the Treasurer, to whom the letter was addressed, or by clerks appointed by him and authorized or directed by him to open his mail. After their receipt these checks were endorsed by use of a rubber stamp "Commonwealth of Massachusetts, Charles L. Burrill, Treas." the stamp being used by the Receiving Teller or some other employee in the office of the Treasurer and Receiver-General. They were thereupon deposited in the bank account standing in the name of the Commonwealth of Massachusetts, Charles L. Burrill, Treas., together with other general revenue of the Commonwealth. Checks upon this account and upon other bank accounts of the Commonwealth are signed either by the Treasurer and Receiver-General or the Deputy Treasurer and Receiver-General, acting under his directions. They are paid by the bank without other signature or authority.

The defendant knew that from time to time certain foreign corporations were paying excise taxes assessed upon them under protest, on the ground of alleged unconstitutionality, and that some of these corporations were litigating the validity of those taxes in the Massachusetts Supreme Judicial Court and in the United States Supreme Court, through counsel for the plaintiff in this case and by means of the proceedings provided in the Massachusetts statute.

At the time of the payments of April 24, 1916 and April 25, 1917 by the plaintiff a petition by it against the Commonwealth under St. 1909, c. 490, pt. 3, §70, and St. 1914, c. 724, for the recovery of taxes of the same character and amount paid in the previous year had been filed in the Supreme Judicial Court for the County of

10 Suffolk and had been argued before the full bench of that court but had not yet been decided. (See *Locomobile Co. v. Commonwealth*, 228 Mass. 117, and 246 U. S. 146, for the history of that case.) In that case a complete copy of the plaintiff's petition containing its claims that the said statute were unconstitutional and void, and the specific objections thereto as afterwards sustained by the Supreme Court and insisted upon in the present case was duly served by a Deputy-Sheriff upon the defendant.

No protest was made by the plaintiff at the time of making above payments.

The Receiving Teller who endorsed and deposited the check and issued a receipt therefor, and whatever employee, if not himself opened and read said letter were appointed by the Treasurer and Receiver-General and acted in this respect in the name and in behalf of the Treasurer and Receiver-General.

It is not claimed that the defendant as Treasurer and Receiver

general of the Commonwealth or individually now has in his possession any specific or identified fund in any manner representing said check or its proceeds, but it is admitted that at all times the said bank account has been and still is more than sufficient to cover the amount of said check. It is not claimed that the proceeds of this check went into the hands of or within the control of the said receiving teller.

At the time the said excises became due and were paid, the plaintiff had a place of business in this Commonwealth which it occupied under lease, which it used as an office and repair shop and where the salesmen and agents of the plaintiff were engaged in negotiating sales of automobiles for delivery from or into other states into or from this state, and requiring transportation from or into other states into or from this Commonwealth, and in delivering the same, and were also in connection therewith and by use of the same places of business agencies and instrumentalities engaged in negotiating sales of and in delivering goods deliverable in this state from a local stock of goods kept here.

The domestic sales constituted only a small part of the total sales here made. Except as above stated, no other kind of purely local or domestic business or activities was carried on by the plaintiff in this state.

The plaintiff owns a large amount of real estate and other property located wholly beyond the limits of this state. It pays property taxes in this state on a large amount of merchandise locally taxable in the town or city where located.

If material, it is admitted that within six months after July 21, 1914, April 24, 1916 and April 25, 1917, the plaintiff filed in the Supreme Judicial Court for the Commonwealth of Massachusetts within and for the County of Suffolk petitions for the recovery of tax or taxes involved in this action, under the provisions of St. 1909, c. 490, pt. III, §70, stating the plaintiff's claims of unconstitutionality and the specific grounds therefor in the same way as the plaintiff here claims, which petitions were pending in said court until January 31, 1919, when they were dismissed without prejudice to further suits or proceedings to test the validity of the tax set forth in the petition. The said petitions during that period were awaiting the final action of the United States Supreme Court in test cases, including one brought by this plaintiff, to determine the constitutionality of the statutes above referred to. They were also awaiting the action of the Supreme Judicial Court of Massachusetts upon another petition in the same form and upon the same constitutional grounds brought by this plaintiff involving the question whether it and various other corporations had complied with the requirements of the Massachusetts statutes in bringing proceedings for the recovery of these taxes. For the latter case see *International Paper Co.*

v. Commonwealth, 332 Mass. 7.

CHAS. A. SNOW &
WM. P. EVERTS,

Attorneys for Plaintiff.

WM. HAROLD HITCHCOCK,

Attorney for Defendant.

13 On the said twenty fifth day of February, A. D. 1920, this cause came on to be heard together with the cause entitled No. 1157, Law Docket, Russell, Miller Milling Company v. Charles L. Burrill, on the foregoing Agreed Facts and was fully heard by the Court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, and on the ninth day of March, 1920, a Memorandum of Decision was announced ordering judgment to be entered for the plaintiff for the sums paid with interest thereon from the dates of payment.

On the eleventh day of March, A. D. 1920, the following Claim of Exception was filed:

Claim of Exception.

(Filed March 11, 1920.)

And now comes the defendant and claims an exception to the refusal of the Court to grant each of his requests for rulings.

By His Attorney, WM. HAROLD HITCHCOCK.

This cause was thence continued to the present March Term, A. D. 1920, when, to wit, March 17, 1920, a Bill of Exceptions is filed by defendant, and allowed on the 27th day of said March.

Thereupon, the following Judgment is entered:

Judgment.

March 27, 1920.

And now, to wit, March 27, 1920, it is ordered upon the finding of the court, the Honorable George W. Anderson, Circuit Judge, sitting as aforesaid, that the said Locomobile Company, plaintiff, recover of the said Charles L. Burrill, defendant, the sum of three thousand one hundred thirty three dollars and ninety one cents (\$3,133.91) damages, with costs taxed at —.

Defendant's Bill of Exceptions.

(Filed March 17, 1920; Allowed March 27, 1920.)

14 This is an action of contract to recover money alleged to be had and received by the defendant to the plaintiff's use. The pleadings are hereby made a part of this bill of exceptions. After a waiver of trial by jury, the case was heard before Anderson, J., sitting without a jury; the only evidence before him being an agreed statement of facts filed by the parties, which is hereby made a part of this bill of exceptions. The defendant requested the court to rule as follows:

1. Upon all the evidence the plaintiff is not entitled to recover.

2. The taxes for the recovery of which this action is brought were in all respects constitutional and valid.

3. The decision in *Locomotive Co. v. Massachusetts*, 246 U. S. 146 being based upon a misconception of the construction given by the Massachusetts Supreme Judicial Court to Statute 1909, Chap. 490, Part III, Sec. 56, and Statute 1914, Chap. 724 in their combined operation, as appears from the subsequent decision of that Court in *Liquid Carbonic Co. v. Commonwealth*, 232 Mass. 19 and *Lawton Spinning Co. v. Commonwealth*, 232 Mass. 28, is not binding in this case upon the question of the validity of the taxes herein involved.

4. As Statute 1909, Chap. 490, Part III, Sec. 56, is held by the Massachusetts Supreme Judicial Court to be in all respects separate and severable from Statute 1914, Chapter 724, and as the taxes here involved have been assessed solely under the former statute which has been held valid by the Supreme Court of the United States (*Baltic Mining Co. v. Massachusetts*, 231 Mass. 68; *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147), such taxes are in all respects valid.

5. Any personal common law liability otherwise existing on the part of the defendant for taxes paid to him as Treasurer and Receiver-General of the Commonwealth by any corporation has been entirely removed and repealed by Statute 1909, Chap. 490, Part III, Sec. 70, and therefore this suit cannot be maintained against him.

6. There being no evidence that any of the sums paid by the plaintiff ever came under the personal control of the defendant, he is not liable in this action for any sums paid by the plaintiff as shown by the evidence.

7. There being no evidence that at the time of the payment of any of the taxes involved in this case the plaintiff gave notice to the defendant that it proposed to hold him personally liable therefor, this action cannot be maintained.

8. It appearing that all the taxes involved in this case were paid by the plaintiff without protest of any sort made at the time of such payment, this action cannot be maintained.

9. On the evidence in this case all payments made by the plaintiff were voluntary payments made without fraud or duress by the defendant or by any one for whose acts he is responsible, therefore this action cannot be maintained.

15 The Court refused to give any of the foregoing requests for rulings and ordered that judgment be entered for the plaintiff for the sum paid on April 24, 1916 and April 25 1917 as set forth in the agreed facts with interest from the date of payment, to which refusal the defendant duly excepted.

Wherefore, the defendant prays that this, his bill of exceptions, may be allowed.

By His Attorney, WM. HAROLD HITCHCOCK.

May be allowed.

WM. C. EVERTS,

Atty. for Plff.

March 27, 1920.—Exceptions allowed.

G. W. ANDERSON,

Circ. Judge.

Memorandum of Decision.

March 9, 1920.

ANDERSON, J.:

This is an action for money had and received brought by a foreign corporation against the Treasurer of the Commonwealth of Massachusetts to recover taxes assessed for the years 1917 and 1918 \$1,300 each year, together with interest thereon from the respective dates of payment, to wit: April 24, 1916 and April 25, 1917.

The case was submitted on agreed facts and heard with No. 1157 Russell, Miller Milling Co. v. Charles L. Burrill, decided this day. The case of International Paper Co. v. Burrill, decided by this court on September 19, 1919, was also submitted and argued by the same counsel.

Every point involved in this case has already been decided by this court in these other cases, excepting only the question as to whether a formal protest at the time of payment was necessary in order to prevent the payments from being construed as voluntary payments.

In the International Paper Co. case I intimated, although it was not necessary to decide the point, that the agreed facts warranted and perhaps required a finding of implied duress, making formal protest unnecessary. On principle and authority I think that such finding and ruling must be made. It is not easy to believe that persons and corporations pay money voluntarily under statutes the constitutionality of which is in dispute and subsequently determined in favor of the tax payer.

17 The language of Mr. Justice Holmes in Atchison etc. Railway v. O'Connor, 223 U. S. 280, 286, seems to me to cover the case fully. "Courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made." Other authorities are referred to in the memorandum I wrote in the International Paper Co. case.

The result is that there must be judgment for the plaintiff for the amounts paid, with interest thereon from the dates of payment.

Defendant's Petition for Writ of Error.

(Filed May 17, 1920.)

And now comes Charles L. Burrill, the defendant in the above entitled cause and says that on the 27th day of March, 1920, the

District Court of the United States for the District of Massachusetts entered a judgment against him in favor of the plaintiff in which judgment and the proceedings had prior thereto in this action certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed herewith.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected, and the said judgment reversed; and that a transcript of the record, proceedings and papers in this action, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES L. BURRILL,
By WM. HAROLD HITCHCOCK,
Attorney.

18 Writ of Error allowed upon the execution of a bond by the defendant as principal and the Massachusetts Bonding & Ins. Company as surety in the sum of \$4,000.

G. W. ANDERSON,
United States Circuit Judge.

Assignment of Errors.

(Filed May 17, 1920.)

Now comes the defendant in the above entitled case and with his petition for a writ of error makes the following assignment of errors, and says that there is manifest error in the proceedings of the District Court in the following respects, namely:

1. In that the Court refused to rule as requested by the defendant.

1. Upon all the evidence the plaintiff is not entitled to recover.

2. In that the Court refused to rule as requested by the defendant.

2. The taxes for the recovery of which this action is brought were in all respects constitutional and valid.

3. In that the Court refused to rule as requested by the defendant.

3. The decision in *Locomobile Co. v. Massachusetts*, 246 U. S. 146 being based upon a misconception of the construction given by the Massachusetts Supreme Judicial Court to Statute 1909, Chap. 490, Part III, Sec. 56, and Statute 1914, Chap. 724 in their combined operation, as appears from the subsequent decision of that Court in *Liquid Carbonic Co. v. Commonwealth*, 232 Mass. 19 and *Lawton Spinning Co. v. Commonwealth*, 232 Mass. 28, is not binding in this case upon the question of the validity of the taxes herein involved.

4. In that the Court refused to rule as requested by the defendant.

4. As statute 1909, Chap. 490, Part III, Sec. 56 is held by the Massachusetts Supreme Judicial Court to be in all respects separate and severable from Statute 1914, Chapter 724, and as the taxes here involved have been assessed solely under the former statute which has been held valid by the Supreme Court of the United States (*Baltic Mining Co. v. Massachusetts*, 231 Mass. 68; *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147), such taxes are in all respects valid.

19 5. In that the Court refused to rule as requested by the defendant.

5. Any personal common law liability otherwise existing on the part of the defendant for taxes paid to him as Treasurer and Receiver-General of the Commonwealth by any corporation has been entirely removed and repealed by Statute 1909, Chap. 490, Part III, Sec. 70, and therefore this suit cannot be maintained against him.

6. In that the Court refused to rule as requested by the defendant.

6. There being no evidence that any of the sums paid by the plaintiff ever came under the personal control of the defendant, he is not liable in this action for any sums paid by the plaintiff as shown by the evidence.

7. In that the Court refused to rule as requested by the defendant.

7. There being no evidence that at the time of the payment of any of the taxes involved in this case the plaintiff gave notice to the defendant that it proposed to hold him personally liable therefor, the action cannot be maintained.

8. In that the Court refused to rule as requested by the defendant.

8. It appearing that all the taxes involved in this case were paid by the plaintiff without protest of any sort made at the time of such payment, this action cannot be maintained.

9. In that the Court refused to rule as requested by the defendant.

9. On the evidence in this case all payments made by the plaintiff were voluntary payments made without fraud or duress by the defendant or by anyone for whose acts he is responsible, therefore the action cannot be maintained.

10. In that the Court ruled that the taxes paid by the plaintiff to the defendant as set forth in the agreed statement of facts were illegal and void as being in violation of the Constitution of the United States.

11. In that the Court ruled that as against this plaintiff the provisions of Massachusetts statutes 1909, Chap. 490, Part III

20 Sec. 56 were at the date of the payment of the taxes described in the agreed statement of facts void as being in violation of the Constitution of the United States.

12. In that the Court found for the plaintiff upon the facts set forth in the agreed statement of facts.

CHARLES L. BURRILL,
By WM. HAROLD HITCHCOCK,
Attorney.

Bond on Writ of Error.

(Filed May 17, 1920; Approved June 2, 1920.)

Know all men by these presents, That we, Charles L. Burrill of Boston in the County of Suffolk and Commonwealth of Massachusetts, as principal, and Massachusetts Bonding and Insurance Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its principal office in Boston, Massachusetts, as sureties, are held and firmly bound unto The Locomobile Company of America, a corporation duly established by the laws of West Virginia, in the full and just sum of four thousand dollars to be paid to the said The Locomobile Company of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of May in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a District Court of the United States for the District of Massachusetts, in a suit depending in said Court between the said The Locomobile Company of America and the said Charles L. Burrill judgment was rendered against the said Charles L. Burrill and the said Charles L. Burrill having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Locomobile Company of America, citing and admonishing it to be and appear in the United States Supreme Court in the city of Washington, District of Columbia, on the second day of July, A. D. 1920.

21 Now, the condition of the above obligation is such, That if the said Charles L. Burrill shall prosecute his writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES L. BURRILL. [SEAL.]
MASSACHUSETTS BONDING AND INSURANCE CO., [SEAL.]

By SAMUEL S. PERRY,
Vice President.

Attest:

EVERETT H. CRITCHETT,

Asst. Secretary.

Sealed and delivered in presence of

Approved:

G. W. ANDERSON

22

Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Locomobile Company, a corporation duly organized under the laws of the State of West Virginia, and having an usual place of business in Boston, Mass. Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* second day of July next pursuant to a Writ of Error filed in the Clerk's Office of the† District Court of the United States for the District of Massachusetts wherein Charles L. Burrill, of Boston, Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts this second day of June, in the year of our Lord one thousand nine hundred and twenty.

G. W. ANDERSON,

U. S. Circuit Judge.

*Not exceeding 30 days from the day of signing.

†Name of Court to which Writ of Error is directed.

23

Acknowledgment of Service of Citation on Writ of Error.

June 7, 1920.

Due and sufficient service of the within citation is hereby accepted.

WM. C. EVERTS,

Attorney for the Locomobile Co.

Clerk's Certificate.

UNITED STATES OF AMERICA,

District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled, No. 1155, Law Docket, Locomobile Company, Plaintiff, v. Charles L. Burrill, Defendant, in said District Court determined, Defendant's Bill of Exceptions, Memorandum of Decision, dated March 9, 1920, Defendant's Petition for Writ of Error, Assignment of Errors, Bond on Writ of Error, and also the original Citation issued in this cause, with the Acceptance of Service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this twenty sixth day of June, A. D. 1920.

[Seal of the United States District Court, Massachusetts.]

JAMES S. ALLEN,

Clerk.

Endorsed on cover: File No. 27,790. Massachusetts D. C. U. S. Term No. 433. Charles L. Burrill, treasurer and receiver-general of the Commonwealth of Massachusetts, plaintiff in error, vs. Locomobile Company. Filed July 1st, 1920. File No. 27,790.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1921

No. 99

**CHARLES L. BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF IN ERROR,**

vs.

RUSSELL; MILLER MILLING COMPANY.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MASSACHUSETTS.**

FILED JULY 1, 1922.

(27,791)



(27,791)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 434.

CHARLES L. BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF IN ERROR,

vs.

RUSSELL, MILLER MILLING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MASSACHUSETTS.

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1

*Writ of Error.*UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Russell, Miller Milling Company, a corporation organized under the laws of North Dakota, and having an usual place of business in Boston, Massachusetts, plaintiff, and Charles L. Burrill, of Boston, Mass., defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the second day of July next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and twenty.

JAMES S. ALLEN,
*Clerk of the District Court of the United
States, District of Massachusetts.*

Allowed by

G. W. ANDERSON,
U. S. Circuit Judge.

2

Return of District Court on Writ of Error.

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss.:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In Testimony Whereof, I James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this twenty-sixth day of June, A. D. 1920.

[SEAL.]

JAMES S. ALLEN,
Clerk.

Transcript of Record of District Court.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States, Begun and Holden at Boston, Within and for the District of Massachusetts, on the Third Tuesday of March, Being the Sixteenth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Before the Honorable James M. Morton, Jr., District Judge.

No. 1157. Law Docket.

RUSSELL, MILLER MILLING COMPANY, Plaintiff,

v.

CHARLES L. BURRILL, Defendant.

MASSACHUSETTS,
District, ss:

Writ.

[L. s.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of Charles L. Burrill, of Boston, in our District of Massachusetts, to the value of five thousand (\$5,000.00) dollars, and summon said defendant (if he may be found in your District) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the first Tuesday of December. Then and there, in our said Court, to answer unto Russell, Miller Milling Company, a corporation organized under the laws of North Dakota, and having an usual place of business in said Boston. In an

4 action of Contract; to the damage of the said Russell, Miller Milling Company, (as it says) the sum of five thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, The Honorable James M. Morton, Jr., at Boston, the 13th day of November, in the year of our Lord one thousand nine hundred and nineteen.

MARY E. PRENDERGAST,
Deputy Clerk.

Acceptance of Service of Writ.

Boston, November 13, 1919.

Service of this writ is hereby accepted.

WM. HAROLD HITCHCOCK,
Attorney for Defendant.

This cause was duly entered at the December Term of this Court, A. D. 1919, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, December 2, 1919, the following Declaration was filed:

Declaration.

(Filed December 2, 1919.)

Now comes the plaintiff in the above entitled action and says that the defendant owes it the sum of \$3,862.64, according to the account annexed marked "A."

By Its Attorneys, CHAS. A. SNOW.
WM. C. EVERTS.*Account Annexed.*

"A."

<p>Item 1. To money had and received by the defendant to the plaintiff's use, being the foreign corporation excises paid by the plaintiff to and unlawfully collected by the defendant on November 23, 1914 under the professed authority of Massachusetts Acts 1909 c. 490, part 3, section 56, and Acts 1914, c. 724, the said excises and each of them being unconstitutional and void, and having been unlawfully exacted and collected by the defendant from the plaintiff through duress, threats and compulsion, and under the plaintiff's written protest.....</p>	\$800.00
<p>Item 2. To interest on same from the date of payment of said excises to the date of the writ.....</p>	238.80
<p>Item 3. To money had and received by the defendant to plaintiff's use, being the foreign corporation excises paid by the plaintiff to and unlawfully collected by the defendant on November 24, 1915 under the professed authority of Massachusetts Acts 1909, c. 490, part 3, section 56, and Acts 1914, c. 724, the said excises and each of them being unconstitutional and void, and having been unlawfully exacted and collected by the defendant from the plaintiff through duress, threats and compulsion, and under the plaintiff's written protest..</p>	800.00

Item 4.	To interest on same from the date of payment of said excises to the date of the writ.	190.64
Item 5.	To money had and received by the defendant to the plaintiff's use, being the foreign corporation excises paid by the plaintiff to and unlawfully collected by the defendant on December 4, 1916 under the professed authority of Massachusetts Acts 1909, c. 490, part 3, section 56, and Acts 1914, c. 724, the said excises and each of them being unconstitutional and void, and having been unlawfully exacted and collected by the defendant from the plaintiff through duress, threats and compulsion, and under the plaintiff's written protest.	\$800.00
Item 6.	To interest on same from the date of payment of said excises to the date of the writ.	141.20
Item 7.	To money had and received by the defendant to the plaintiff's use, being the foreign corporation excises paid by the plaintiff to and unlawfully collected by the defendant on December 13, 1917 under the professed authority of Massachusetts Acts 1909, c. 490, part 3, section 56, and Acts 1914, c. 724, and said excises and each of them being unconstitutional and void, and having been unlawfully exacted and collected by the defendant on December 13, 1917 under the professed authority of Massachusetts Acts 1909, c. 490, part 3, section 56, and Acts 1914, c. 724, the said excises and each of them being unconstitutional and void, and having been unlawfully exacted and collected by the defendant from the plaintiff through duress, threats and compulsion, and under the plaintiff's written protest.	800.00
Item 8.	To interest on same from the date of payment of said excises to the date of the writ.	92.00
Item 9.	Total.	\$3,862.64

At the same term, to wit, December 10, 1919, the following Answer was filed:

Answer.

(Filed December 10, 1919.)

Now comes the defendant in the above entitled cause and makes answer to the plaintiff's writ and declaration as follows:

1. He denies each and every allegation in the plaintiff's writ and declaration contained.

2. And further answering, he says that this action was not brought within three months from the date of the payment of the taxes therein described, as required by St. 1909, c. 490, pt. II, § 88.

3. And further answering, he says that at all times mentioned in the plaintiff's declaration he was the duly elected Treasurer and Receiver-General of the Commonwealth of Massachusetts; that each of the sums set forth in the declaration was assessed by the Tax Commissioner of the Commonwealth upon the plaintiff as taxes due under the statutes of the Commonwealth; that each of said sums was voluntarily paid by the plaintiff to him solely in his capacity of Treasurer and Receiver-General of the Commonwealth, and not otherwise, without protest and without any demand, threat, compulsion or duress by him or by any other person, and without the issuance of any legal process for the enforcement of said payments; that each of said amounts was paid by him into the treasury of the Commonwealth of Massachusetts as a part of the general revenue of the Commonwealth, and has now been expended by it for general public purposes; that no one of said taxes is in any respect unconstitutional or void; that said sums never came into the hands of the defendant personally but were thus received and paid into the treasury of the Commonwealth in his behalf by the receiving teller in the employ of the Commonwealth, whose duty it was to receive such payments in behalf of the Commonwealth; that the defendant, except as a public officer of and in behalf of the Commonwealth, as aforesaid, had at no time received any sum of money from the plaintiff, as alleged in the declaration, or otherwise, and owes the plaintiff nothing.

By His Attorney, WM. HAROLD HITCHCOCK,

Assistant Attorney-General.

8 Also at the same term, to wit, March 5, 1920, the following Agreed Statement of Facts was filed as of February 25, 1920:

Agreed Statement of Facts.

(Filed March 5, 1920, as of February 25, 1920.)

It is hereby agreed that the following facts may be taken as admitted facts, for the purpose of this case, subject to the right of either party to present further evidence and to request rulings of law.

The plaintiff is a foreign corporation transacting in Massachusetts both interstate and local business in conjunction.

The defendant was from January 20, 1915 to January 21, 1920, the Treasurer and Receiver-General of the Commonwealth of Massachusetts, and, in connection with the collection of the excise claimed to be recovered herein, professed to act as such, under the authority of Massachusetts statutes (St. 1909, c. 490, pt. III, § 56, and St. 1914, c. 724) and under the other sections of the same acts relating to such excises and the penalties for non-payment thereof and for failure to file the annual certificate of condition.

On November 24, 1915, more than thirty days after its annual meeting, the plaintiff submitted to the Secretary of the Commonwealth, without request or demand by him other than such request or demand as may be implied by law, its certificate of condition,

under the alleged requirements of St. 1909, c. 490, pt. III, § 54, which was approved by the Tax Commissioner and filed on the same day. On that day the Tax Commissioner issued a certificate purporting to show that there was due from the plaintiff an excise tax of eight hundred dollars (\$800) assessed pursuant to the statute of 1909, while the Acts of 1914, c. 724, were still in force.

On December 4, 1916, more than thirty days after its annual meeting, the plaintiff submitted to the Secretary of the Commonwealth, without request or demand by him other than such request or demand as may be implied by law, its certificate of condition,

9 under the alleged requirements of St. 1909, c. 490, pt. III, § 54, which was approved by the Tax Commissioner and filed on the same day. On that day the Tax Commissioner issued a certificate purporting to show that there was due from the plaintiff an excise tax of eight hundred dollars (\$800) assessed pursuant to the statute of 1909, while the Acts of 1914, c. 724, were still in force.

On December 13, 1917, more than thirty days after its annual meeting, the plaintiff submitted to the Secretary of the Commonwealth, without request or demand by him other than such request or demand as may be implied by law, its certificate of condition, under the alleged requirements of St. 1909, c. 490, pt. III, § 54, which was approved by the Tax Commissioner and filed on the same day. On that day the Tax Commissioner issued a certificate purporting to show that there was due from the plaintiff an excise tax of eight hundred dollars (\$800) assessed pursuant to the statute of 1909, while the Acts of 1914, c. 724 were still in force.

Each of these statutes professed to require that said excises should be paid to the Treasurer and Receiver-General of the Commonwealth at the time of filing the certificate of condition and before said certificate could be allowed to be filed.

These taxes were paid at the office of the defendant, as Treasurer and Receiver-General on November 24, 1915, December 4, 1916 and December 13, 1917, by checks of the plaintiff, payable to the order of the Treasurer of the Commonwealth of Massachusetts. These checks were enclosed in envelopes which were received in due course of mail at the office of the Secretary of the Commonwealth and were sent by him to the office of the Treasurer. After their receipt the checks were endorsed by use of a rubber stamp "Commonwealth of Massachusetts, Charles L. Burrill, Treas." the stamp being used by the Receiving Teller or some other employee in the place of the Treasurer and Receiver-General. They were thereupon deposited in the bank account standing in the name of the Commonwealth of Massachusetts, Charles L. Burrill, Treas., together with other general

10 revenue of the Commonwealth. Checks upon this account and upon other bank accounts of the Commonwealth are signed either by the Treasurer and Receiver-General or the Deputy Treasurer and Receiver-General, acting under his directions. They are paid by the clerk without other signature or authority. These checks were enclosed in an envelope with the certificate of condition of the company, addressed to the Secretary of the Com-

monwealth, and were each accompanied by a letter, a copy of which is hereto annexed.

The Receiving-Teller aforementioned issued to the plaintiff a receipt for the amount of the tax, upon the face of which was stamped the words "paid under protest." Each of these letters was sent by the Secretary of the Commonwealth to the office of the Treasurer, together with the check enclosed, and the fact that the payment was under protest was noted in a book in the office of the Treasurer in which all corporation tax payments were listed. Neither party is able to produce evidence as to whether or not these letters or the checks ever passed through the hands of the defendant personally or in any way came to his attention before the bringing of this suit. The defendant would testify that he has no personal recollection of having at any time seen the letters. The letters remained on file in the office of the Treasurer and Receiver-General until the bringing of this suit.

The defendant knew that from time to time certain foreign corporations were paying excise taxes assessed upon them under protest, on the ground of alleged unconstitutionality, and that some of these corporations were litigating the validity of these taxes in the Massachusetts Supreme Judicial Court and in the United States Supreme Court, through counsel for the plaintiff in this case and by means of the proceedings provided in the Massachusetts statute.

At the time of the payments November 24, 1915, December 4, 1916 and December 13, 1917 by the plaintiff petitions against the Commonwealth under St. 1909, c. 490, pt. III, §70 and St. 1914, c.

724, for the recovery of taxes of the same character and amount paid in the previous years had been filed in the Supreme Judicial Court for the County of Suffolk, by the Locomobile Company of America, and the constitutionality of these taxes had been argued before the full bench of that court by the attorney for the plaintiff. It was decided September 13, 1917, (See *Locomobile Co. v. Commonwealth of Massachusetts*, 288 Mass. 117, and 246 U. S. 146, for the history of that case.) In that case a complete copy of the plaintiff's claims that the said statutes were unconstitutional and void, and the specific objections thereto and insisted upon in the present case was duly served by a Deputy-Sheriff upon the defendant.

The Receiving Teller who endorsed and deposited the check and issued a receipt therefor, and whatever employee, if not himself, received and read said letter were appointed by the Treasurer and Receiver-General and acted in this respect in the name and in behalf of the Treasurer and Receiver-General.

It is not claimed that the defendant as Treasurer and Receiver-General of the Commonwealth or individually now has in his possession any specific or identified fund in any manner representing said check or its proceeds, but it is admitted that at all times the said bank account has been and still is more than sufficient to cover the amount of said check. It is not claimed that the proceeds of this check went into the hands of or within the control of the said receiving-teller.

At the time the said excises became due and were paid, the plaintiff had a place of business in this Commonwealth which it occupied under lease, which it used as an office, and which had charge of the business of the Company in New England, requiring transportation from or into other states into or from this Commonwealth, and in delivering the same.

The domestic sales constituted only a small part of the total sales here made. Except as above stated, no other kind of purely local or domestic business or activities was carried on by the plaintiff in this state.

12 The plaintiff owns a large amount of real estate and other property located wholly beyond the limits of this state.

If material, it is admitted that within six months after November 24, 1914, December 4, 1916, and December 13, 1917, the plaintiff filed in the Supreme Judicial Court for the Commonwealth of Massachusetts within and for the County of Suffolk petitions for the recovery of tax or taxes involved in this action, under the provisions of St. 1909, c. 490, pt. III, §70, stating the plaintiff's claims of unconstitutionality and the specific grounds therefor in the same way as the plaintiff here claims, which petitions were pending in said court until January 31, 1919, when they were dismissed without prejudice to further suits or proceedings to test the validity of the tax set forth in the petition. The said petitions during that period were awaiting the final action of the United States Supreme Court in test cases to determine the constitutionality of the statutes above referred to. It was also awaiting the action of the Supreme Judicial Court of Massachusetts upon another petition in the same form and upon the same constitutional grounds involving the question whether it and various other corporations had complied with the requirements of the Massachusetts statutes in bringing proceedings for the recovery of these taxes. For the latter case see *International Paper Co. v. Commonwealth*, 232 Mass. 7.

CHAS. A. SNOW &
WM. P. EVERTS,

Attorneys for Plaintiff.

WM. HAROLD HITCHCOCK,

Attorney for Defendant.

13

Copy.

Boston, Dec. 10th, 1917.

Secretary of the Commonwealth,
State House, Boston.

DEAR SIR:

I enclose for filing in your office the annual certificate of condition of the Russell-Miller Milling Co., a foreign corporation, together with check for \$5 filing fee.

I also enclose check for \$800, for the foreign corporation excise due to accompany said certificate.

The said company makes payment of said excise and files said certificate of condition under protest and duress, claiming that the said

tax and the statutes compelling the filing of said certificate and the payment of said tax are unconstitutional and void and have no lawful application to said company.

Very truly yours,

(Signed)

CHARLES A. SNOW,
Atty. for Russell-Miller Milling Co.

14 On the said twenty-fifth day of February, A. D. 1920, this cause came on to be heard together with the cause entitled No. 1155, Law Docket, The Locomobile Company v. Charles L. Burrill, on the foregoing Agreed Facts and was fully heard by the Court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, and on the ninth day of March, 1920, a Memorandum of Decision was announced, ordering judgment to be entered for the plaintiff for the sum paid with interest thereon.

On the twelfth day of March, A. D. 1920, the following Claim of Exception was filed:

Claim of Exception.

(Filed March 12, 1920.)

And now comes the defendant and claims an exception to the refusal of the Court to grant each of his requests for rulings.

By His Attorney, WM. HAROLD HITCHCOCK.

This cause was thence continued to the present March Term, A. D. 1920, when, to wit, March 17, 1920, a Bill of Exceptions is filed by defendant, and allowed on the 27th day of said March.

Thereupon, the following Judgment is entered:

Judgment.

March 27, 1920.

And now, to wit, March 27, 1920, it is ordered upon the finding of the court, the Honorable George W. Anderson, Circuit Judge, sitting as aforesaid, that the said Russell, Miller Milling Company, plaintiff, recover of the said Charles L. Burrill, defendant, the sum of two thousand eight hundred seventy seven dollars and twenty cents (\$2,877.20) damages, with costs taxed at —.

15 *Defendant's Bill of Exceptions.*

(Filed March 17, 1920; Allowed March 27, 1920.)

This is an action of contract to recover money alleged to be had and received by the defendant to the plaintiff's use. The pleadings are hereby made a part of this bill of exceptions. After a waiver

of trial by jury, the case was heard before Anderson, J. sitting without a jury; the only evidence before him being an agreed statement of facts filed by the parties, which is hereby made a part of this bill of exceptions. The defendant requested the Court to rule as follows:

1. Upon all the evidence the plaintiff is not entitled to recover.
2. The taxes for the recovery of which this action is brought were in all respects constitutional and void.
3. The decision in *Locomotive Co. v. Massachusetts*, 246 U. S. 146 being based upon a misconception of the construction given by the Massachusetts Supreme Judicial Court to Statute 1909, Chap. 490, Part III, Sec. 56, and Statute 1914, Chap. 724 in their combined operation, as appears from the subsequent decision of that Court in *Liquid Carbonic Co. v. Commonwealth*, 232 Mass. 19 and *Lawton Spinning Co. v. Commonwealth*, 232 Mass. 28, is not binding in this case upon the question of the validity of the taxes herein involved.
4. As Statute 1909, Chap. 490, Part III, Sec. 56, is held by the Massachusetts Supreme Judicial Court to be in all respects separate and severable from Statute 1914, Chapter 724, and as the taxes here involved have been assessed solely under the former statute which has been held valid by the Supreme Court of the United States (*Baltic Mining Co. v. Massachusetts*, 231 Mass. 68; *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147), such taxes are in all respects valid.
5. Any personal common law liability otherwise existing on the part of the defendant for taxes paid to him as Treasurer and Receiver-General of the Commonwealth by any corporation has been entirely removed and repealed by Statute 1909, Chap. 490, Part III, Sec. 70, and therefore this suit cannot be maintained against him.
6. There being no evidence that any of the sums paid by the plaintiff ever came under the personal control of the defendant, he is not liable in this action for any sums paid by the plaintiff as shown by the evidence.
7. There being no evidence that at the time of the payment of any of the taxes involved in this case the plaintiff gave notice to the defendant that it proposed to hold him personally liable therefor, this action cannot be maintained.
8. The protest made by the plaintiff at the time of the payment of the various taxes involved in this case was not a sufficient notice to the defendant that it proposed to hold him personally liable for those payments, and therefore this action cannot be maintained.
9. On the evidence in this case all payments made by the plaintiff were voluntary payments made without fraud or duress by the defendant or by any one for whose acts he is responsible, therefore this action cannot be maintained.

The Court refused to give any of the foregoing requests for rulings and ordered that judgment be entered for the plaintiff for the sums paid on November 24, 1915, December 4, 1916 and December 13, 1917, as set forth in the agreed facts with interest from the date of payment, to which refusal the defendant duly excepted.

Wherefore, the defendant prays that this, his bill of exceptions, may be allowed.

By His Attorney, WM. HAROLD HITCHCOCK.

May be allowed.

WM. P. EVERTS,

Atty. for Plff.

March 27, 1920.—Exceptions allowed.

G. W. ANDERSON,

Cir. Judge.

Memorandum of Decision.

March 9, 1920.

ANDERSON, J.:

This action is brought by a foreign corporation to recover from the Treasurer of the Commonwealth three payments of \$800 each, paid under protest on November 24, 1915, December 4, 1916 and December 13, 1917, respectively.

The case, in my opinion, is on all fours with No. 1060, Law, International Paper Company v. Burrill, decided by this court on September 19, 1919, to the opinion in which reference may be had for a reference to authorities and general considerations which constrain me to the conclusion reached.

But the defendant undertakes to distinguish this case on the ground that the tax levied was less than \$2,000, and was, therefore, as is argued, levied under the Massachusetts Statute of 1909, chap. 490, part 3, sec. 56, held constitutional by the Supreme Court of the United States in Baltic Mining Co. v. Massachusetts, 231 U. S. 68, and Cheney Bros. Co. v. Massachusetts, 246 U. S. 147. The defendant contends that the amendment of 1914, chap. 724, is separable from the Act of 1909, and that therefore the combination of the two Acts held unconstitutional does not apply to this case.

It does not seem to me that the mere fact that a corporation is small enough so that under the Act of 1909, as amended by the Act of 1914, less than \$2,000 is assessed, is an adequate reason for holding the Act of 1909 is not to be construed together with the Act of 1914 as making a single system of taxation. Moreover, I do not regard that question as open to this court of first instance.

In Liquid Carbonic Co. v. Commonwealth, 232 Mass. 19, the Massachusetts Supreme Judicial Court, Rugg, C. J. said:

"We are unable to discern any reason why in Locomobile Co. of America v. Massachusetts, 246 U. S. 146, it would not have been held that said §56 and said c. 724 were separable and the excise

valid under §56, if that court had thought that principle of law to be pertinent. *International Textbook Co. v. Pigg*, 217 U. S. 91, 113. The conclusion cannot be escaped, in our opinion, that in *Locomobile Co. of America v. Massachusetts*, 246 U. S. 146, the Supreme Court of the United States decided that an excise, assessed and collected as was the one here assailed, was exacted illegally. It would be idle for us to discuss that question. The last word has been spoken by the court of final appeal upon that subject. That is a decision by which we are bound on this point. We yield to its controlling authority. That decision seems to us to govern exactly the case at bar."

The construction thus put by the Massachusetts court upon the decision of the Supreme Court seems to me plainly correct. The decision of the Supreme Court of the United States is of course binding upon me. It follows that unless and until the Supreme Court of the United States shall adopt the theory now urged by counsel for the defendant as to the relation between these two statutes, the tax now in question was illegally levied. So holding, the case is, as indicated, indistinguishable in principle from *International Paper Co. v. Burrill*, and there must be judgment for the plaintiff for the sums paid, with interest thereon from the dates of payment.

18

Defendant's Petition for Writ of Error.

(Filed May 17, 1920.)

And now comes Charles L. Burrill, the defendant in the above entitled cause and says that on the 27th day of March, 1920, the District Court of the United States for the District of Massachusetts entered a judgment against him in favor of the plaintiff in which judgment and the proceedings had prior thereto in this action certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed herewith.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected, and the said judgment reversed; and that a transcript of the record, proceedings and papers in this action, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES L. BURRILL,

By WM. HAROLD HITCHCOCK,

Attorney.

Writ of error allowed upon the execution of a bond by the defendant as principal and the Massachusetts Bonding & Insurance Company as surety in the sum of \$3,500.

G. W. ANDERSON,

United States Circuit Judge.

Assignment of Errors.

(Filed May 17, 1920.)

Now comes the defendant in the above entitled case and with his petition for a writ of error makes the following assignment of errors, and says that there is manifest error in the proceedings of the District Court in the following respects, namely:

1. In that the Court refused to rule as requested by the defendant,
 1. Upon all the evidence the plaintiff is not entitled to recover.
2. In that the Court refused to rule as requested by the defendant,
 2. The taxes for the recovery of which this action is brought were in all respects constitutional and valid.
3. In that the Court refused to rule as requested by the defendant,

19 3. The decision in *Locomobile Co. v. Massachusetts*, 246 U. S. 146 being based upon a misconception of the construction given by the Massachusetts Supreme Judicial Court to Statute 1909, Chap. 490, Part III, Sec. 56, and Statute 1914, Chap. 724 in their combined operation, as appears from the subsequent decision of that Court in *Liquid Carbonic Co. v. Commonwealth*, 232 Mass. 19 and *Lawton Spinning Co. v. Commonwealth*, 232 Mass. 33, is not binding in this case upon the question of the validity of the taxes herein involved.

4. In that the Court refused to rule as requested by the defendant,
 4. As statute 1909, Chap. 490, Part III, Sec. 56 is held by the Massachusetts Supreme Judicial Court to be in all respects separate and severable from Statute 1914, Chapter 724, and as the taxes here involved have been assessed solely under the former statute which has been held valid by the Supreme Court of the United States (*Baltic Mining Co. v. Massachusetts*, 321 Mass. 68; *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147), such taxes are in all respects valid.

5. In that the Court refused to rule as requested by the defendant,
 5. Any personal common law liability otherwise existing on the part of the defendant for taxes paid to him as Treasurer and Receiver-General of the Commonwealth by any corporation has been entirely removed and repealed by Statute 1909, Chap. 490, Part III, Sec. 70, and therefore this suit cannot be maintained against him.

6. In that the Court refused to rule as requested by the defendant,
 6. There being no evidence that any of the sums paid by the plaintiff ever came under the personal control of the defendant, he

is not liable in this action for any sums paid by the plaintiff as shown by the evidence.

7. In that the Court refused to rule as requested by the defendant.

7. There being no evidence that at the time of the payment of any of the taxes involved in this case the plaintiff gave notice to the defendant that it proposed to hold him personally liable therefor, this action cannot be maintained.

8. In that the Court refused to rule as requested by the defendant.

8. The protest made by the plaintiff at the time of the payment of the various taxes involved in this case was not a sufficient notice to the defendant that it proposed to hold him personally liable for those payments, and therefore this action cannot be maintained.

9. In that the Court refused to rule as requested by the defendant.

9. On the evidence in this case all payments made by the plaintiff were voluntary payments made without fraud or duress by the defendant or by anyone for whose acts he is responsible, therefore this action cannot be maintained.

20 10. In that the Court ruled that the taxes paid by the plaintiff to the defendant as set forth in the agreed statement of facts were illegal and void as being in violation of the Constitution of the United States.

11. In that the Court ruled that as against this plaintiff the provisions of Massachusetts statutes 1909, Chap. 490, Part III, Sec. 56 were at the date of the payment of the taxes described in the agreed statement of facts void as being in violation of the Constitution of the United States.

12. In that the Court found for the plaintiff upon the facts set forth in the agreed statement of facts.

CHARLES L. BURRILL,
By WM. HAROLD HITCHCOCK,

Attorney.

Bond on Writ of Error.

(Filed May 17, 1920; Approved June 2, 1920.)

Know all men by these presents, That we, Charles L. Burrill of Boston in the County of Suffolk and Commonwealth of Massachusetts, as principal, and Massachusetts Bonding and Insurance Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its principal office in Boston, Massachusetts, as sureties, are held and firmly bound unto Russell Miller Milling Co., a corporation duly established by the laws of North Dakota in the full and just term of thirty-five hundred dollars

to be paid to the said Russell Miller Milling Co., its certain attorney, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of May in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a District Court of the United States for the District of Massachusetts, in a suit depending in said Court between the said Russell Miller Milling Co. and the said Charles L. Burrill judgment was rendered against the said Charles L. Burrill and the said Charles L. Burrill having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Russell Miller Milling Co. citing and admonishing it to be and appear in the United States Supreme Court in the city of Washington, District of Columbia, on the second day of July, A. D. 1920.

Now, the condition of the above obligation is such, That if the said Charles L. Burrill shall prosecute his writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES L. BURRILL. [SEAL.]
MASSACHUSETTS BONDING AND IN-
SURANCE CO., [SEAL.]

By SAMUEL S. PERRY,
Vice President.

Attest:

EVERETT H. CRICHETT,
Assistant Secretary.

Sealed and delivered in presence of
— — —

Approved:

G. W. ANDERSON.

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Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Russell, Miller Milling Company, a corporation organized under the laws of North Dakota, and having an usual place of business in Boston, Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* second day of July next pursuant to a Writ of Error

*Not exceeding 30 days from the day of signing.

filed in the Clerk's Office of the† District Court of the United States for the District of Massachusetts wherein Charles L. Burrill, of Boston, Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts this second day of June, in the year of our Lord one thousand nine hundred and twenty.

G. W. ANDERSON,

U. S. Circuit Judge.

23 *Acknowledgment of Service on Citation on Writ of Error.*

June 7, 1920.

Due and sufficient service of the within citation is hereby accepted.

WM. C. EVERTS,

Attorney for Russell, Miller Milling Co.

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Clerk's Certificate.

UNITED STATES OF AMERICA,

District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled, No. 1157, Law Docket, Russell, Miller Milling Company, Plaintiff, v. Charles L. Burrill, Defendant, in said District Court determined, Defendant's Bill of Exceptions, Memorandum of Decision, dated March 9, 1920, Defendant's Petition for Writ of Error, Assignment of Errors, Bond on Writ of Error, and also the original Citation issued in this cause, with the Acceptance of Service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this twenty sixth day of June, A. D. 1920.

[Seal of the United States District Court, Massachusetts.]

JAMES S. ALLEN,

Clerk.

Endorsed on cover: File No. 27,791. Massachusetts D. C. U. S. Term No. 434. Charles L. Burrill, treasurer and receiver-general of the Commonwealth of Massachusetts, plaintiff in error, vs. Russell, Miller Milling Company. Filed July 1st, 1920. File No. 27,791.

†Name of Court to which Writ of Error is directed.

the decision.

BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *v.* LOCOMOBILE COMPANY.

SAME *v.* RUSSELL, MILLER MILLING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MASSACHUSETTS.

Nos. 98, 99. Argued January 25, 26, 1922.—Decided February 27,
1922. .

1. Massachusetts Statutes 1909, c. 490, Part III, §§ 70 and 71, provides, as the exclusive remedy for recovering a tax illegally exacted under the act, a petition to the Supreme Judicial Court and prompt repayment by the State of the sum there adjudged, and relieves the collector from liability to personal action. P. 37.
2. The time fixed for filing the petition—six months—is reasonable. P. 37.

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Argument for Defendants in Error.

3. In the absence of a controlling act of Congress, the right of a foreign corporation to recover taxes exacted under an unconstitutional state statute may be confined by the state law to the direct responsibility of the State and the collector of the taxes be thereby relieved of personal liability, even when sued in the federal court, at least where the remedy afforded is adequate. P. 37.
4. *Quaere*: Whether the proceeding given by the Massachusetts statute, *supra*, could be instituted in the Federal District Court? P. 39.
5. The Constitution, standing alone, does not create a paramount, unchangeable liability to an action of tort on the part of all persons who may take part in enforcing a state law that it invalidates, but leaves the remedies to Congress and the States. P. 38.

Reversed.

ERROR to judgments for damages rendered by the District Court in actions to recover corporation excise taxes collected by the defendant and alleged and found to have been exacted by duress under an unconstitutional statute.

Mr. Wm. Harold Hitchcock for plaintiff in error.

Mr. William P. Everts, with whom *Mr. Edward E. Blodgett* and *Mr. Charles L. Favinger* were on the brief, for defendants in error.

The provision that the remedy by petition in the state court shall be exclusive, cannot affect the maintenance of this suit, where the federal court has jurisdiction, not only because of diverse citizenship, but also because the Federal Constitution is involved.

It is not necessary to treat at length the claim of the plaintiff in error that this provision ousts the jurisdiction of this court, which obviously has jurisdiction, both by reason of diverse citizenship of the parties and because of the federal constitutional questions which are involved.

It is clear that "a State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." *Smyth v. Ames*, 169 U. S. 466, 517;

Union Pacific R. R. Co. v. Weld County, 247 U. S. 282; *Nevada-California Power Co. v. Hamilton*, 235 Fed. 317, 339; *International Paper Co. v. Burrill*, 260 Fed. 664, 669; *Cunningham v. Macon &c. R. R. Co.*, 109 U. S. 446, 452, Distinguishing *Lamborn v. County Commissioners*, 97 U. S. 181, 185, and *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 274. See *Ward v. Love County*, 253 U. S. 17.

Certainly the remedy must fall when the tax itself is declared unconstitutional. This special provision making the statutory remedy "exclusive" falls as a part of the unconstitutional statute. *Harrington v. Glidden*, 179 Mass. 486, 492.

Moreover, c. 724, Acts of 1914, including § 2, which contains the provision that the remedy "shall be exclusive," was expressly repealed by Acts of 1918, c. 76, and can have no application here. Since 1879 the Superior Court was given jurisdiction of all claims at law or in equity against the Commonwealth. Gen. Laws, c. 258, § 1.

The obvious purpose of the legislature was to provide that these tax questions should be determined by the Supreme Court in the County of Suffolk. The statute above referred to stated that the Superior Court "except as otherwise expressly provided" shall have jurisdiction, etc. It is clear that the suit in the Supreme Court provided for was one of the exceptions referred to in c. 258, § 1, Gen. Laws, and that it was not the intention of the legislature to abolish any remedies against public officers.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are suits by foreign corporations to recover taxes alleged to have been paid to the defendant, the Treasurer of Massachusetts, under duress, and in obedience to statutes held by this Court to be unconstitutional in *International Paper Co. v. Massachusetts*, 246 U. S. 135, and

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Opinion of the Court.

Locomotive Co. v. Massachusetts, 246 U. S. 146. On the merits the defendant says that these taxes were collected under St. 1909, c. 490, Part III, § 56, held valid in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68; that the maximum limit to the tax fixed by that statute, which saved it, was supposed by this Court in the later decisions mentioned to have been removed by a later Act of 1914, c. 724, (246 U. S. 145); but that since that time the Supreme Judicial Court of Massachusetts has held that the Act of 1909 was independent of the statute of 1914 and remained valid and unaffected by the latter unconstitutional act. *Liquid Carbonic Co. v. Commonwealth*, 232 Mass. 19. *Lawton Spinning Co. v. Commonwealth*, 232 Mass. 28. He also says that by § 70 of the Act of 1909 any corporation aggrieved by the exaction of the tax may within six months after payment apply by petition to the Supreme Judicial Court, which shall be the exclusive remedy; that there is a provision in § 71 for prompt repayment of any sum adjudged to have been illegally exacted, and that these sections are a bar to a personal suit.

It is unnecessary to go farther than to say that we agree with the defendant upon the latter point. As to the construction of the words, they mean, we have no doubt, what was expressed more at length in an earlier statute on the same matter, that the petition "shall take the place of any and all actions which might otherwise be maintained by such corporation on account of the assessment and collection of such tax, and shall be the exclusive remedy." Stat. 1867, c. 52, § 4; continued with slight change in Pub. Stats. (1882), c. 13, § 66, and abridged to the present form in Rev. Laws (1902), c. 14, § 67. The words embodied a fixed policy of the State and must stand whether the levy of the tax is good or bad.

But it is said that a State cannot tie up the plaintiffs to suits in its own courts, and this objection coupled with the suggestion that the legislature might shorten the time

still farther or deny all remedy, if the defence is good, prevailed with the judge who decided these cases, as appears from *International Paper Co. v. Burrill*, 260 Fed. 664, 668, 669. We may dispose of the latter point first. The time for filing the petition is not unreasonably short for this class of cases, considering that the statute is dealing with taxes on the one side and business organizations on the other. And it by no means follows that a legislature may establish an unreasonable limitation because it may establish a reasonable one. We may lay on one side too the cases that show that States cannot confine parties to their own courts for the assertion of admitted rights. The question here is whether the State could not limit the right of foreign corporations coming into it and the liability of its own citizens in the way supposed. It is true that it cannot constitutionally impose certain taxes upon foreign corporations, but if the law of the United States stops there we do not perceive why the State may not provide that only the author of the wrong shall be liable for it, at least when, as here, the remedy offered is adequate and backed by the responsibility of the State. That it may do so is implied in *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 274.

The Constitution standing alone without more does not create a paramount unchangeable liability to an action of tort on the part of all persons who may take part in enforcing a state law that it invalidates. It leaves the remedies to Congress and the States. Congress acting under the Constitution has given to the courts of the United States a jurisdiction in equity that, speaking broadly, is the same in all the States and follows its own rules. Rev. Stats., § 913. *Boyle v. Zacharie*, 6 Pet. 648, 658. *McConihay v. Wright*, 121 U. S. 201. But as to trials at common law, except when the Constitution, treaties or statutes of the United States otherwise require or provide, the laws of the States are the rules of decision. Rev.

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Counsel for Parties.

Stats., § 721. Congress has made no provision that governs the liability in this case and therefore has left it to the law of the State where the wrong is done. If there were no statute the common law of Massachusetts would supplement the Constitution as it would supplement the statutes of the State. But the common law of Massachusetts is not superior to its statutes and may be modified by them at the pleasure of the State, at least until in some substantial sense it impairs substantive constitutional rights, which it has not attempted to do. Whether in an otherwise proper case the proceeding given by the statute could be instituted in the District Court is not before us here. See *Ames v. Kansas*, 111 U. S. 449. *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U. S. 239.

Judgments reversed.

MR. JUSTICE PITNEY, being absent, took no part in the decision.
